

ILLINOIS
COMMERCE COMMISSION
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VERIFIED STATEMENT
OF
JOHN M. GARVEY
TELECOMMUNICATIONS DIVISION
ILLINOIS COMMERCE COMMISSION

Docket No. 00-0027

February 28, 2000

1 **Q. Please state your name and business address.**

2 A. My name is John M. Garvey and my business address is 527 East Capitol
3 Avenue, Springfield, Illinois 62794.

4
5 **Q. What is your occupation?**

6 A. I am a Policy Analyst in the Telecommunications Division of the Illinois
7 Commerce Commission ("Commission").

8
9 **Q. Please describe your educational and occupational background.**

10 A. I graduated in 1992 from Michigan State University with a Bachelor of Arts
11 (with honors) in Social Science. In 1995, I was awarded a Master of
12 Science in Public Policy from the London School of Economics. In 1997, I
13 was awarded a Master of Science in Regulation also from the London
14 School of Economics. On February 1, 1999, I earned my Juris Doctor
15 from DePaul University in Chicago.

16 My work experience includes law clerking at Rowland and Moore, a
17 telecom law firm in Chicago. In that capacity, I worked extensively on
18 interconnection agreements and subsequent arbitration proceedings at
19 the Commission. Furthermore, I participated in reciprocal compensation
20 dockets at the Commission, doing substantive research and writing on the
21 FCC's policy toward enhanced service providers. In a related matter, I
22 authored an industry white paper analyzing the FCC decision holding that
23 GTE's xDSL service is jurisdictionally interstate. My experience also

1 includes a legal internship with the Public Utilities Bureau of the Cook
2 County State's Attorney. In that role, I worked primarily on the
3 Ameritech/SBC merger. I have also worked in London, England and
4 Kuala Lumpur, Malaysia dealing with telecom regulatory issues.

5 My research papers include a thesis entitled The
6 Telecommunications Act of 1996: An End to Telephony Regulation? The
7 thesis explores the local competition, inter-LATA relief, and deregulatory
8 provisions in the new act. While in law school, I authored a paper entitled
9 Select Issues in US and EU Telephony Law. The paper analyzes
10 interconnection, jurisdiction, and convergence issues in both the US and
11 European telecom industries. In Malaysia, I authored a paper for Albar,
12 Zulkifly and Yap-a law firm representing the Malaysian government-on
13 the various mechanisms by which dialing parity for new local exchange
14 carriers can be implemented.

15 I joined the Commission on June 1, 1999 as a Policy Analyst in the
16 Telecommunications Division. As an analyst, I provided expert testimony
17 on a competitive reclassification docket. In addition, I have worked
18 extensively on collocation issues and interconnection agreements,
19 including arbitrations.

20
21 **Q. What is the purpose of your testimony?**

22 **A.** The purpose of my testimony is to address the third issue in this
23 arbitration, which concerns the terms and conditions by which Focal can

1 order from Ameritech what is often called an Enhanced Extended Link
2 (“EEL”).
3

4 **Q. Please describe what an EEL is.**

5 A. An EEL is a combination of an unbundled loop, dedicated transport and
6 oftentimes a multiplexing/concentrating functionality. Both the unbundled
7 loop and dedicated transport are unbundled network elements (“UNEs”)
8 that Focal may obtain separately from Ameritech at TELRIC prices. The
9 loop/transport combination is not, however, a separate UNE. The
10 availability of the already-combined UNEs is beneficial for Focal which
11 would otherwise need to combine them and incur additional costs. In
12 addition, the use of EELs allows Focal to service an end user without
13 having to collocate at the end office that serves that particular end user.
14 Instead, Focal need only collocate at one Ameritech central office and
15 then purchase an EEL to serve a customer serviced by an Ameritech end
16 office other than the one at which Focal is collocated.
17

18 **Q. Is Ameritech required to provide EELs to Focal?**

19 A. Yes, in certain instances. FCC Rule 315(b), which was reinstated by the
20 Supreme Court, precludes Ameritech from separating loop and dedicated
21 transport circuits that it “currently combines”. One combination of
22 loop/transport, special access, is functionally identical to an EEL-the only
23 effective difference being the price. Based on Rule 315(b), the FCC in the

1 UNE Remand Order determined that incumbent LECs must convert
2 special access to EELs at the request of a carrier.' Focal is entitled to
3 obtain these loop-transport combinations at TELRIC prices, instead of at
4 the interstate special access prices.²

5
6 **Q. Did the FCC place any limitations on the right of a carrier to convert
7 special access circuits to EELs?**

8 **A.** Yes. In the Supplemental Order, the FCC stated that interexchange
9 carriers ("IXCs") may not convert special access to EELs unless they
10 provide a "significant" amount of local exchange service to a particular
11 customer.³ This limitation arose from a concern that special access
12 revenue-which helps support universal service and local rates-would
13 be reduced significantly if IXCs could replace their more expensive special
14 access with the cheaper EELs. The "significant" amount requirement
15 would apply to LECs like Focal who seek to convert special access to
16 EELs.⁴

17
18 **Q. Is Ameritech required to combine UNEs that it does not currently
19 combine and offer the combination to Focal at TELRIC prices?**

¹ *UNE Remand Order* at ¶480.

² *Id.*

³ *Supplemental Order* at ¶5.

⁴ *Id.*

1 A. No, not at the present time. Rules 315(c)-(f) require incumbent LECs to
2 combine unbundled network elements in any manner, even if the
3 incumbent does not “currently combine” them. A decision by the US.
4 Court of Appeals for the 8th Circuit on the validity of Rules 315(c)-(f) is
5 pending.

6
7 **Q. Please summarize Focal’s first concern regarding Ameritech’s**
8 **limitations on the availability of EELs.**

9 A. Focal argues that both Ameritech’s definition of “significant” and its self-
10 certification requirement violates FCC rules. If a special access circuit is to
11 be converted into an EEL, Ameritech requires Focal to self-certify the
12 following: (1) At least 1/3 of the customers’ local exchange service must be
13 provided by Focal; (2) at least 50% of the circuits included in an EEL must
14 have at least 5% local voice traffic; and (3) the entire DS1 facility must have
15 at least 10% local voice traffic. Furthermore, in tabulating the percentage of
16 local traffic, Ameritech would preclude Focal from counting Internet access
17 traffic as local exchange traffic.

18
19 **Q. Has the FCC defined what they consider to be a “significant” amount**
20 **of local traffic?**

21 A. No. However, the FCC has provided substantial guidance as to what it
22 would consider to be ‘significant’ local traffic. Notably, the FCC has

1 stated that it would consider the following to meet the “significant” local
2 service requirement?

3 Loop/transport combinations (extended links) for DS1 level and
4 above should be available only when the competitive local
5 exchange carrier (CLEC) provides an integrated local/toll service to
6 the customer and handles at least one third of the customer’s local
7 traffic. In addition, on the DS1 loop portion of the combination, at
8 least 50 percent of the activated channels have at least 5 percent
9 local voice traffic individually and, for the entire DS1 facility, at least
10 10 percent of the traffic is local.⁶

11
12 The requirements in this language are almost identical to Ameritech’s
13 proposed requirements at issue in this docket.

14
15 **Q. What is your recommendation as to the lawfulness and**
16 **reasonableness of Ameritech’s definition of “significant”?**

17 A. Because the FCC has not defined the term “significant”, and because
18 requirements virtually identical to those proposed by Ameritech were cited
19 by the FCC as an example of “significant” local traffic, I see no reason
20 why Ameritech’s definition should be rejected. If the definition of
21 “significant” is left ambiguous as Focal witness Starkey proposes, future
22 conflicts would be expected. Ameritech could use the ambiguity to file
23 disingenuous complaints claiming that Focal’s traffic was not sufficiently
24 local. Or, Focal could self-certify that they are providing significant local

⁵ Id. at n9.

⁶ This language is contained in a joint **Ex Parte** submission in the *Supplemental Order*. See Letter from Edward D. Young, III, Senior Vice President and Deputy General Counsel, Bell Atlantic et al., CC Docket No. 96-98, at 1-2 (filed Sept. 2, 1999).

1 exchange traffic even though the amount is minimal. With specific
2 numerical standards, these incentives are reduced.

3
4 **Q. Ameritech would require Focal to self-certify that the definition of**
5 **“significant” local traffic is met. Is this requirement consistent with**
6 **FCC rules?**

7 A. Yes. In the Supplemental Order, the FCC requires Focal to self-certify
8 that they are providing a “significant” amount of local traffic.’ However,
9 auditing requirements should not be a precondition to converting special
10 access to EELs.⁸ If subsequent to a conversion Ameritech has concerns
11 about the tabulation methodology utilized by Focal, Ameritech can file a
12 complaint with this Commission. Ameritech should not be entitled to delay
13 or rescind the conversion until this Commission formally concurs pursuant
14 to the complaint process.

15
16 **Q. Ameritech also would require Focal to treat Internet access calls as**
17 **interstate for purposes of self-certification. Do you agree with this**
18 **requirement?**

19 A. No. While it is true that the FCC has defined the jurisdictional nature of
20 Internet access calls as primarily interstate, the status of reciprocal
21 compensation is still ambiguous and various judicial and regulatory

⁷ Id.

⁸ Id.

1 proceedings are pending. Moreover, the FCC has given no indication that
2 they would require carriers to certify that ISP calls will not be treated-for
3 purposes of tabulating the extent of local traffic-as local. Consequently,
4 Focal should not have to self-certify that they are treating Internet access
5 calls as interstate. Instead, they should only be required to self-certify that
6 their tabulation of traffic is consistent with state and federal laws, rules
7 and regulations. This statement makes no legal conclusions that may
8 impact future judicial or administrative proceedings.

9
10 **Q. Ameritech would require Focal to pay applicable termination charges**
11 **for special access that are converted to EELs. Is this requirement**
12 **consistent with FCC rules?**

13 **A. Yes.** The UNE Remand Order specifically states that appropriate
14 termination penalties required under volume or term contracts may be
15 applied when converting special access to EELs.⁹ Of course, termination
16 penalties must be reasonable and comply with the Uniform Commercial
17 Code and common law.

18
19 **Q. Ameritech would require Focal to pay applicable service ordering**
20 **charges and other administrative charges when it converts special**
21 **access service to EELs. Is this requirement reasonable?**

⁹ *UNE Remand Order* at ¶486.

1 A. Ameritech should be able to recover any costs it incurs to convert special
2 access circuits to EELs. For example, service ordering costs would
3 probably be incurred as a result of a conversion. However, network-
4 related costs for converting special access circuits to EELs probably
5 would not be incurred because the loop/transport combination is already
6 in place.

7
8 **Q. Ameritech restricts the conversion of special access to EELs to**
9 **those loop/transport combinations existing on or before November**
10 **24, 1999. What is Ameritech's rationale for imposing this cut-off**
11 **date?**

12 A. Ameritech argues that without the cut-off date, Focal will be able to
13 accomplish "sham" conversions of special access circuits to EELs. These
14 "sham" requests, they argue, would violate the 8th Circuits vacafurof rules
15 315(c)-(9-which require incumbent LECs to combine UNEs in any
16 manner, even if the incumbent does not "currently combine" them. By
17 placing "sham" orders for special access, and then immediately
18 requesting the conversion of those services to EELs, Ameritech claims a
19 *de facto* requirement to combine UNEs similar to Rules 315(c)-(f) would
20 be instituted. By imposing a time restriction, Ameritech intends to
21 preclude Focal from ordering "sham" special access and then immediately
22 requesting their conversion to EELs. Any special access circuits

1 purchased after November 24, 1999 would not be eligible for conversion
2 to EELs.

3
4 **Q. Are Ameritech's concerns regarding "sham" ordering reasonable?**

5 A. No. Ameritech's scenario where Focal will purchase special access in
6 order to immediately convert them to EELs is based on a faulty premise.
7 Ameritech misinterprets the FCC's term "currently combines" as only
8 applying to those UNEs that are "already combined".¹⁰ Under Ameritech's
9 proposed "already combined" interpretation, Focal would have to first
10 order special access and then request that it be converted to an EEL.
11 However, under a proper reading of the FCC's "currently combined"
12 language, Focal can order EELs directly without first ordering special
13 access and then requesting they be converted to EELs.

14
15 **Q. Please explain in detail why you believe Ameritech has**
16 **misinterpreted the FCC's requirement.**

17 A, As previously mentioned, the FCC relies on Rule 315(b) as a legal basis
18 to require the conversion of special **access** to EELs. Rule 315(b)
19 provides:

20 Except upon request, an incumbent LEC shall not separate
21 requested network elements that the incumbent currently
22 combines.
23

"Verified Statement of Patricia Fleck at 2-3.

1 (Emphasis added.) In the FCC's First Report and Order, the FCC clarified
2 that "currently combines" means "ordinarily combines within their network,
3 in the manner which they are typically combined." (Emphasis added.)
4 Because a loop and dedicated transport are "ordinarily" combined within
5 Ameritech's network-for example, as special access circuits-Focal is
6 entitled to request an EEL even if the loop/transport elements are not
7 physically connected at the time of the order.

8 In contrast, Ameritech would require that the loop and dedicated
9 transport elements be already physically connected at the time Focal
10 requests the EEL. Thus, for circuits that are not already combined,
11 Ameritech's definition would require Focal to request special access, and
12 then request that the special access be converted to an EEL.

13 The FCC has declined to resolve this definitional uncertainty,
14 deferring to the 8th Circuits pending decision on the validity of the FCC's
15 original definition. However, regardless of what definition of "currently
16 combines" is upheld by the court, in both cases Focal should be entitled to
17 order an EEL, even for combinations which are not now in place. If the
18 FCC definition is upheld, Focal can order an EEL directly from Ameritech
19 without first having to combine the elements by ordering special access.
20 If Ameritech's interpretation of "currently combines" is upheld, Focal would
21 first have to order special access and then request that it be converted to
22 an EEL. This circuitous route is needless and delays competition. I
23 recommend that the Commission adhere to the FCC definition of

1 'currently combines', allowing Focal to place one order for an EEL instead
2 of two separate orders.

3
4 **Q. In your opinion, why does Ameritech assume that the FCC has**
5 **changed their definition of “currently combines” from “ordinarily**
6 **combines” to “already combined”?**

7 A. As mentioned, Ameritech has apparently misinterpreted the FCC's UNE
8 Remand Order. Ameritech cites FCC language that seems to imply EEL
9 conversion is only required for those instances where an “unbundled loop
10 is in fact connected to unbundled dedicated transport.”¹¹

11
12 **Q. Why do you believe Ameritech's reliance on this language is**
13 **misplaced?**

14 A. First, the FCC was merely stating that, regardless of which definition is
15 used, Rule 315(b) at the very least includes “already combined” elements.
16 Since a carrier who purchases special access has the elements already
17 combined, even under the more narrow definition a carrier would still be
18 able to convert special access to EELs. Second, the FCC made clear that
19 it would not address the definitional conflict between the two competing
20 definitions of “currently combines” because of the pending 8th Circuit
21 decision. This suggests that the FCC did not modify its original definition

¹¹ *UNE Remand Order* at ¶480.

1 of “currently combines”. Third, the FCC did not disavow its definition of
2 “currently combines” in the UNE Remand Order. Accordingly, the only
3 FCC definition remains the original: “currently combines” means
4 “ordinarily combined” within Ameritech’s network, in the manner which
5 they are typically combined.

6
7 **Q. Please summarize your recommendation as to the lawfulness of**
8 **Ameritech’s November 24, 1999 cut-off date.**

9 A. The FCC gives Ameritech no such authority to place limitations on Focal’s
10 access to EELs based on an arbitrary date unilaterally chosen by
11 Ameritech. Rule 315(b) precludes Ameritech from separating UNEs that it
12 “currently combines”. Under either definition of “currently combines”,
13 Ameritech is required to provide EELs to Focal on an unlimited basis,
14 subject only to the requirement that Focal self-certify that it is providing a
15 “significant” amount of local traffic over those circuits.

16
17 **Q. Have any other state commissions addressed the provision of EELs**
18 **subsequent to the UNE Remand Order?**

19 A Yes. Various commissions have concurred with my recommendation in
20 this docket. For example, the Georgia Commission held that “currently
21 combines” means “ordinarily combined” and therefore:

CLECs can order combinations of typically combined elements, even if the particular elements being ordered are not actually physically connected at the time the order is placed.¹²

The Pennsylvania Commission also Ruled that any restrictions placed on a carrier's access to EELs is unlawful.¹³

Q. Please summarize your testimony.

A. My recommendations are as follows: (1) Ameritech's definition of "significant" local traffic should be approved; (2) Focal should not be required to self-certify that they are not treating ISP calls as local calls; (3) Focal should be required to self-certify that they are providing "significant" local traffic, so long as auditing is not a part of that self-certification process; (4) Focal is required to pay applicable termination charges; (5) Ameritech should be able to recover any administrative costs actually incurred as a result of a conversion; and (6) Ameritech's cut-off date for conversion of special access to EELs is unlawful.

Q. Does this conclude your testimony?

A. Yes.

¹² *Petition by ICG Telecom Group, Inc. for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. 10767-U, pp. 6-1 (1999).
¹³ *Joint Petition of Nextlink Pennsylvania, Inc. et al.*, Docket No. P-00991648, P-00991649 (September 30, 1999).

VERIFICATION

STATE OF ILLINOIS)
) ss
COUNTY OF SANGAMON)

I, John M. Garvey, do on oath depose and state that if called as a witness herein, I would testify to the facts contained in the foregoing document based upon personal knowledge.

John M. Garvey

SIGNED AND SWORN TO BEFORE ME THIS 28th DAY OF
February, 2000.

Joyce Adcock
NOTARY PUBLIC

